80-1793

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ALEXANDER L. STEVAS,
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NO._____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

THOMAS RANDALL WATSON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

* * *

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA

* * *

PETITION FOR A WRIT OF CERTIORARI

* * *

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure of the trial court to note *sua sponte*, the obvious inadequacy of petitioner's legal representation constituted plain error which was properly before the Alabama Court of Criminal Appeals on petitioner's direct appeal from his judgment of conviction.

2. Whether the failure of the Alabama Court of Criminal Appeals to note and consider, *sua sponte*, the obvious inadequacy of petitioner's legal representation as plain error apparent on the record of the trial proceedings constituted error and denied petitioner his Fourteenth Amendment right to due process of law.

3. Whether the failure of the Alabama Court of Criminal Appeals to permit issues going to adequacy of legal representation to be raised for the first time on appeal constitutes abridgment of the Sixth Amendment guarantee of adequate legal assistance and of the Fourteenth Amendment guarantee of due process of law.

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* * *

The petitioner, Thomas Randall Watson, respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Alabama entered on October 7, 1980.

* * *

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals, not yet reported, appears in the Appendix hereto. The Supreme Court of the State of Alabama denied certiorari in the case submitted for review to this Court, noting that the petitioner had not employed applicable Alabama Rules of Procedure to present the issue asserted in his petition for Certiorari and stating that it was compelled to deny his petition. The opinion of the Alabama Supreme Court, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on October 7, 1980. Timely application for rehearing was denied on November 25, 1980. Timely petition for certiorari to the Alabama Supreme Court was denied on February 20, 1981, and this petition for Certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner seeks review of a judgment convicting him for perjury and sentencing him to imprisonment for three years.

The petitioner was tried under an indictment alleging that petitioner had falsely sworn under oath during the taking of an oral deposition in a civil slander suit that petitioner had not had a telephone conversation with one M.M. Kennedy, Jr. on July 21, 1978, wherein certain statements were allegedly made by petitioner. (App. 31) At trial and on appeal, the petitioner was represented by retained counsel.

During the course of the trial, the State called three witnesses. Mr. M.M. Kennedy, Jr., the chief State's witness, testified as to his recollection of a telephone conversation with the petitioner on July 21, 1978, and of the statements allegedly made during that conversation. Mr. Kennedy testified that a State agent was present with Kennedy during the alleged telephone conversation and made a tape recording of the conversation. (App. 32)

The State agent present with Mr. Kennedy during the telephone conversation was Mr. H.E. Mitchell, a Sergeant in the Alabama Department of Public Safety. Sergeant Mitchell, the second witness called by the State, testified that he had tape recorded the conversation in question, and that it contained the voices of Kennedy, the petitioner, and another participant. (App. 33) At the conclusion of Sergeant Mitchell's testimony on direct examination, the State offered the tape into evidence whereupon the petitioner's counsel objected and asked to examine Sergeant Mitchell on voir dire outside of the presence of the jury.

On voir dire examination by petitioner's counsel, Sergeant Mitchell admitted that he could not identify the voices on the tape recording through his own independent knowledge, and that his identification of the voices was based on hearsay. (App. 34) The petitioner's trial counsel made no motion to exclude Sergeant Mitchell's testimony identifying the voices. During Sergeant Mitchell's

cross-examination in the presence of the jury, petitioner's counsel again failed to make any motion to exclude Sergeant Mitchell's testimony and proffered no questions to Sergeant Mitchell concerning his voice identification. The tape recording of the conversation was subsequently admitted into evidence by the trial court. (App. 34)

The tape recording of the telephone conversation was played for the jury and, during the playing of the tape recorded conversation, each juror was given a copy of a transcript of the conversation to read while listening to the tape recording. (App. 37) Although the trial judge had ruled that the transcription of the tape constituted hearsay of the "rankest kind" (App. 36), petitioner's counsel made no objection to the jury being furnished with a copy of the transcription, and stipulated that the transcript of the tape recording could be furnished to each member of the jury without the necessity of any further proof as to its correctness. (App. 36&37) The transcript identified the speakers by name. The tape recording and transcription thereof were the only evidence corroborating the testimony of Mr. M.M. Kennedy, Jr. as required by Alabama law. [1]

Subsequent to the alleged July 21st telephone conversation, the petitioner had filed a civil slander suit against M.M. Kennedy, Jr. (App. 32). During the course of the civil proceedings, the petitioner's oral deposition was taken before Ms. Betty J. Maurer, a shorthand reporter authorized under law to administer oaths. Ms. Maurer, the final State's witness, testified that she had placed the petitioner under oath and taken the petitioner's deposition on November 2, 1978, and that she had prepared a transcription of the deposition. (App. 35) Ms. Maurer identified and read the questions and answers in the petitioner's deposition which formed the basis of the indictment. At the conclusion of Mrs. Maurer's testimony, the State rested.

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[1] **Ex parte Oglesby**, 337 So.2d 381 (Ala. 1976) and **Murry v. State**, 367 So.2d 985 (Ala.Cr.App. 1978), cert. den., 357 So.2d 989 (Ala. 1979), hold that a conviction of perjury must be sustained by the testimony of two witnesses to the corpus delicti or one witness with strong corroborative evidence.

Petitioner's counsel briefly recalled Mr. M.M. Kennedy, Jr., as the only defense witness. Immediately upon the conclusion of Mr. Kennedy's testimony, petitioner's counsel rested his case, and the court instructed the parties to proceed with closing argument to the jury. (App. 37)

During his closing argument the petitioner's counsel apologized to the jury, to petitioner, and to co-counsel for his "snap decision" in resting petitioner's case and in failing to confer with petitioner and with co-counsel, stating as follows:

> "(Petitioner's Counsel): . . . I hope you won't hold any mistakes that I have made or Mr. Melson (Co-counsel) has made against Randall (Petitioner). I would like to apologize to Mr. Melson and Randall also for my snap decision that I made in resting our case. I should have conferred with them but I . . .
>
> (State's Counsel) We object. That has absolutely . . .
>
> THE COURT: I will sustain the objection. Mr. Hardin, that's not permissible argument." (App. 37).

After the foregoing exchange the State's counsel offered to allow the petitioner to reopen his case, at which time petitioner's counsel objected and asked for a mistrial, which was denied. (App. 37)

The trial jury began deliberations on the morning of June 8, 1979, and on the afternoon of June 8, 1979, advised the trial court that they were deadlocked. (App. 38) The trial court charged the jury of their duty to agree on a verdict and the jury continued its deliberations until 6:15 o'clock p.m. on June 8, 1979. The jury returned at 8:00 a.m. the following day and resumed deliberations. Finally, the trial jury reached a guilty verdict on the afternoon of June 9, 1979. (App. 41)

Petitioner's trial counsel filed a motion for a new trial on July 18, 1979, alleging, in grounds 56 and 57, that members of the petit jury panel had failed to respond to voir dire

questions asked during jury selection,[2] and that certain members of the jury made improper statements during deliberations. (App. 25) Petitioner's trial counsel also filed a motion for leave to subpoena the petit jurors alleging that one juror had stated, during deliberations, that he had known the petitioner all of his life and that the petitioner had always been in trouble with the law, and alleging that the improper response of this juror during voir dire examination had denied the petitioner his Constitutional right to trial by fair and impartial jury. (App. 27) Petitioner's counsel later amended his motion for leave to subpoena jurors alleging further juror improprieties. (App. 28) All post trial motions were denied by the trial court. (App. 17)

Petitioner's trial counsel participated in petitioner's direct appeal to the Alabama Court of Criminal Appeals. In his appeal the petitioner argued, inter alia, that his conviction was due to be reversed because it was based on the uncorroborated testimony of the State's witness, M.M. Kennedy, Jr. The Court of Criminal Appeals held that Mr. Kennedy's testimony was corroborated by the tape recording of the alleged conversation with the petitioner, and noted that petitioner: (1) had made no motion to exclude Sergeant Mitchell's testimony identifying the voices; (2) had proffered no questions concerning Sergeant Mitchell's voice identification during cross-examination in the presence of the jury; and, (3) concluded that petitioner's counsel had not preserved error by his failure to make timely and appropriate objections or to move to exclude the witness's testimony.[3] (App. 6)

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[2]These questions, which are set out in the appendix hereto (at p. 30), pertained to the jurors' knowledge of the petitioner and whether they held any opinion of petitioner which might bias their verdict.

[3]Hearsay testimony admitted without objection becomes lawful evidence. **Wilder v. State**, 52 Ala.App. 157, 290 So.2d 225 (1974). Where cross-examination develops that the witness's testimony on direct examination is based on hearsay, the defendant's remedy is to move to exclude the evidence from the jury. **Oates v. State**, 375 So.2d 1285 (Ala.Cr.App. 1979).

The Court of Criminal Appeals further observed that petitioner's trial counsel never objected to furnishing the jury with copies of the transcript which identified the speakers by name, and that petitioner's trial counsel had stipulated that the transcription which included the names of the speakers accurately reflected the information on the tape recording. (App.7&8) The court concluded its observation on this point by stating that: "The trial judge gave the defendant every opportunity to object to both the accuracy and the admissibility of the transcription, but no objections were made." (App. 8)

In response to the petitioner's contention that members of the jury panel failed to respond to pertinent voir dire questions, the Alabama Court of Criminal Appeals ruled that the petitioner's motions for new trial and to subpoena jurors were properly denied because petitioner's counsel had failed to comply with Alabama cases holding that a motion challenging the qualifications of individual jurors -- filed after the commencement of trial -- must allege that the grounds for the motion were not known to the defendant before he went to trial or that he could not have known them by exercising due diligence.[4] (App.17&18)The Court of Criminal Appeals further held that defendant was not entitled to examine a juror whose affidavit had been filed by the State because, again, the defendant had failed to comply with Alabama law relative to the challenging of individual jurors. (App.18)

Finally, the Court of Criminal Appeals, noted that it was at a "particular loss" in reviewing the trial court's order denying the petitioner's motion for a new trial because the particulars of that hearing were not reported. Because of the failure of petitioner's counsel to present a complete record, the Court applied the presumption that the trial court's ruling denying the motion for a new trial was correct.[5] (App.18&19)The Court of Criminal Appeals noted

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[4]See **Williams v. State**, 342 So.2d 1328, 1329 (Ala. 1977).

[5]This presumption is applied as to matters not shown in the record pursuant to **Robertson v. State**, 29 Ala.App. 399, 197 So. 73, cert. den., 240 Ala. 51, 197 So. 75 (1940).

that while petitioner had filed a motion to correct the record, the matter was never presented to the trial judge for a ruling. (App. 19)

Petitioner's trial counsel also participated in the filing of a petition for writ of certiorari to the Alabama Court of Criminal Appeals in the Supreme Court of Alabama based on the issue of juror impropriety. The writ was denied by the Alabama Supreme Court which stated that it was "compelled" to deny the petition because petitioner's counsel had failed to employ appropriate Alabama Rules of Appellate Procedure to present the issues asserted in the petition.[6] (App. 21)

The issue of the inadequacy of petitioner's counsel was not raised on petitioner's direct appeal to the Alabama Court of Criminal Appeals. That court concluded, however, that it had "searched the entire record for error as required by law and found no prejudicial error."[7] (App. 19) The petitioner herein asserts that the Court of Criminal Appeals erred by failing to observe, *sua sponte*, the obvious inadequacy of petitioner's counsel which constituted plain error apparent on the record.

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[6]Alabama Rules of Appellate Procedure 10(f) and 10(k) (App. 23&24) provide the method by which petitioner's counsel could have properly raised the issue for review on certiorari in the Alabama Supreme Court. They were not employed.

[7]The Court of Criminal Appeals is required, by §12-22-240, **Code of Alabama**, 1975, to search the record for error. This statute is included in the appendix hereto (at p. 22).

ARGUMENT

THE FAILURE OF THE ALABAMA COURT OF CRIMINAL APPEALS TO NOTE AND CONSIDER, *SUA SPONTE*, THE OBVIOUS INADEQUACY OF PETITIONER'S LEGAL REPRESENTATION AS PLAIN ERROR ABRIDGED PETITIONER'S SIXTH AMENDMENT GUARANTEE OF EFFECTIVE LEGAL ASSISTANCE.

THE FAILURE OF THE ALABAMA COURT OF CRIMINAL APPEALS TO PERMIT ISSUES GOING TO ADEQUACY OF LEGAL REPRESENTATION TO BE RAISED FOR THE FIRST TIME ON APPEAL CONSTITUTES ABRIDGMENT OF THE SIXTH AMENDMENT GUARANTEE OF ADEQUATE LEGAL ASSISTANCE AND OF THE FOURTEENTH AMENDMENT GUARANTEE OF DUE PROCESS OF LAW.

THE FAILURE OF THE TRIAL COURT TO NOTE, *SUA SPONTE*, THE OBVIOUS INADEQUACY OF PETITIONER'S LEGAL REPRESENTATION CONSTITUTED PLAIN ERROR WHICH WAS PROPERLY BEFORE THE ALABAMA COURT OF CRIMINAL APPEALS ON PETITIONER'S DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION.

The petitioner was represented at trial by incompetent counsel. The record of the trial proceedings and the opinion of the Alabama Court of Criminal Appeals establish that the petitioner failed to receive adequate and effective legal assistance from his retained trial counsel at critical points during the trial and post-trial proceedings. The critical points apparent on the record include:

1. The failure of trial counsel to object to or move to exclude the voice identification made by the State's witness, H.E. Mitchell, after his testimony established that

the voice identification was based on hearsay. This failure led to the admission of a tape recording into evidence which constituted the only corroboration of the testimony of the chief prosecution witness.

2. Trial counsel's stipulation that a transcribed copy of the tape recording could be furnished to each juror to read while listening to the tape recording after the trial court had ruled that the transcript constituted hearsay of the "rankest kind." The transcript, not otherwise admissible without trial counsel's stipulation as to its correctness and admissibility, identified the petitioner by name as one of the participants in the conversation and further corroborated the testimony of the chief prosecution witness.

3. Trial counsel's admitted "snap decision" in resting petitioner's case without first conferring with the petitioner or with co-counsel. This snap decision prevented the petitioner from effectively participating in the defense of his case.

4. Trial counsel's failure to comply with requirements of Alabama cases in post-trial motions attacking the qualifications of jurors for their failure to respond to pertinent voir dire questions and infecting the verdict with prejudice against the petitioner.

5. Counsel's failure to preserve a record of post-trial proceedings for review by the Alabama Court of Criminal Appeals or to correct the record on appeal pursuant to provisions contained in the Alabama Rules of Appellate Procedure.

6. Counsel's failure to preserve issues for review by the Supreme Court of Alabama on petition for writ of certiorari to the Alabama Court of Criminal Appeals by failing to comply with appropriate provisions of the Alabama Rules of Appellate Procedure.

The issue of the inadequacy of legal representation was not raised in the trial court, nor was it raised on the petitioner's appeal to the Alabama Court of Criminal Appeals in which the petitioner's trial counsel participated. The petitioner asserts that the inadequacy of his legal representation is clear and apparent on the face of the

record and that it constituted "plain error" which the Alabama Court of Appeals should have noted and considered, *sua sponte*, on its review of petitioner's conviction.[8]

This Court has long recognized that defendants in criminal cases are entitled to "effective assistance of competent counsel," and that counsel's conduct must be "within the range of competence demanded of attorneys in criminal cases". *McMann v. Richardson*, 397 U.S. 559, 770-771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763, 773 (1970). In *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), this Court recognized that the right to effective assistance of counsel in state trials was guaranteed by the due process clause of the Fourteenth Amendment. In its more recent decision in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, ____ L.Ed.2d ____ (1980), this Court strongly reiterated prior decisions and held that a defendant charged with a serious offense must have counsel "able to invoke the procedural and substantive safeguards that distinguish our system of justice", and that a criminal conviction obtained without sufficiently able counsel "unconstitutionally deprives the defendant of his liberty."[9]

Cuyler v. Sullivan, Id., laid to rest any contention that defendants who retain lawyers are entitled to less protection than defendants for whom the state appoints counsel.[10]

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[8]This case does not involve questions related to standards by which competence is determined. The acts and omissions of petitioner's trial counsel are clearly inadequate under any formulation heretofore enunciated. For example, see the "farce and mockery" doctrine of the Tenth Circuit [**Gillihan v. Rodriguez**, 551 F.2d 1182, 1187, (10th Cir.) cert. den., 434 U.S. 845, 98 S.Ct. 148, 54 L.Ed.2d 111 (1977)] , Second Circuit [**Rickenbacker v. Warden**, 550 F.2d 62, (2nd Cir. 1976) cert. den., 434 U.S. 826, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977)] , and First Circuit [**United States v. Ramirez**, 535 F.2d 125, 129 (1st Cir. 1976)] .

[9]**Cuyler v. Sullivan**, Id., 100 S.Ct. at p. 1715.

[10]Id. at p. 1716. The **Cuyler v. Sullivan** court further acknowledged that decisions made by defendants who retain counsel are "often uninformed" and that there was no basis for drawing a distinction between retained and appointed counsel.

Petitioner recognizes that claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings because there has not been an opportunity to develop a record bearing evidence on the merits of the allegation of inadequacy of representation. Where, however, a defendant's legal representation is grossly and obviously inadequate - and this inadequacy is reflected on the record - it constitutes "plain error". This Court's decisions in *Silber v. United States*, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 789 (1962); *Johnson v. United States*, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943); and, *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936), make clear that the doctrine of plain error encompasses those errors which are obvious, affect the substantial rights of the accused and, if uncorrected, would be an effront to the integrity and reputation of judicial proceedings.

In the instant case petitioner asserts that all of the requirements of the plain error doctrine are met. Petitioner further asserts that where those requirements are met and the "substantial right" which is affected is the right to adequate and effective legal assistance, this Court should now hold that the Constitution demands that such error be noted and considered, *sua sponte*, and that the failure of trial and appellate courts to note such error, *sua sponte*, is an abridgment of the Sixth Amendment right to effective legal assistance of counsel and the Fourteenth Amendment right to due process of law.

While this Court has not ruled on this specific issue, several of the circuits have noted the duty of the trial court to note and consider, *sua sponte*, the inadequacy of a defendant's legal representation, but there is disparity in the application of the doctrine among the circuits.[11]

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[11]For example, the positions of the Second Circuit as announced in **United States v. Aulet**, 618 F.2d 182 (2nd Cir. 1980) and Fifth Circuit, as announced in **United States v. Stephens**, 609 F.2d 230 (5th Cir. 1980) favor collateral attack as to ineffective assistance of counsel claims which were not raised in the trial court. The Ninth Circuit, in **United States v. Kazni**, 576 F.2d 238 (9th Cir. 1978), recognizes that the failure of the trial court to take note, **sua sponte**, of inadequate legal assistance might

The plain error doctrine is not new to Alabama appellate courts. In fact, the Alabama Court of Criminal Appeals is required by Alabama statute to "consider all questions apparent on the record . . . and enter such judgment as the law demands."[12]

The Alabama Court of Criminal Appeals has held that questions involving the adequacy of a defendant's legal representation - which are not raised at trial - may not be considered for the first time on direct appeal. In *Boyd v. State*, 361 So.2d 1179 (Ala.Cr.App. 1978), the Court of Criminal Appeals addressed the contention that the appellant had been denied his Constitutional guarantees of assistance of effective counsel. This contention, and the court's ruling, are set out as follows:

> " ' [I]n the circumstances of this case, the appellant [contends that he] was denied his constitutional guarantee of individual freedom by denial of assistance of effective and reasonably competent counsel.'
>
> "We do not find that this issue was raised in the lower court, and no ruling of the trial court thereon is here presented.
>
> "Our appellate courts have held that new matter may not be raised for the first time in the appellate courts. Alabama Digest, Vol. 7, Criminal Law, Key No. 1030(1)(2); *Scroggins v. State*, Ala.Cr.App., 341 So.2d 967, cert. denied, Ala., 341 So.2d 972; *Cole v. State*, Ala.Cr.App., 337 So.2d 40, cert. denied, Ala., 337 So.2d 47; *Cooper v. State*, Ala.Cr.App., 331 So.2d 752, cert. denied, Ala., 331 So.2d 759; *Fountain v. Vredenburgh Saw Mill Company*, 279 Ala. 68, 181 So.2d 508; Alabama Digest, Vol. 2, Appeal and Error, Key No. 169. *The Supreme Court, on appeal, will not consider constitutional questions not raised in the court below. Howard v.*

Footnote 11 Continued

constitute plain error, while the District of Columbia Circuit seems to strongly recognize a duty on the trial court to observe and note, **sua sponte**, inadequate assistance of counsel claims under the holding of **United States v. DeCoster**, 624 F.2d 196 (D.C.Cir. 1976).

[12]§12-22-240, **Code of Alabama**, 1975. A copy of this statute is included in the appendix at page 22.

Pike, 290 Ala. 213, 275 So.2d 645; Alabama Digest, Vol. 2, Appeal and Error, Key No. 170(2)."[13] (Emphasis Added).

The Court of Criminal Appeals concluded its opinion in petitioner's case by stating that it had "searched the record for error as required by law and found no prejudicial error." However, the error to which the Court of Criminal Appeals referred was not error committed by petitioner's trial counsel - as it pointed to these errors throughout its opinion - but rather, the Court of Criminal Appeals was referring to error committed by the trial judge. Under the holding reiterated in *Boyd v. State*, Id., the petitioner's inadequate legal representation was not deemed to be error because there was no ruling of the trial court on that issue in the record. Of course, it is obvious that as long as the trial court does not recognize, *sua sponte*, the issue of inadequacy of a defendant's legal representation, there will be few, if any, instances where that issue will ever be presented to the trial court and equally few instances where the Court of Criminal Appeals will find that a defendant has been denied a Constitutional right to effective legal assistance.

The result is a clear federal-state dichotomy involving the constitutional right to effective legal assistance of counsel provided to criminal defendants. In federal courts the responsibility of maintaining proper standards of performance of counsel is placed with the trial judge, in contrast to the Alabama state courts where the issue of effective legal assistance of counsel cannot be raised except by collateral attack on the judgment *after* the defendant's conviction and incarceration. Under Alabama procedure there is little incentive for the trial judge to ever note, *sua sponte*, inadequacy of a defendant's legal representation so long as the Alabama appellate courts hold that the matter cannot be raised for the first time on direct appeal.

In *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978), this Court recognized that it is the

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[13]**Boyd v. State**, Id., at pp. 1180-1181.

judge, not counsel, who has the "ultimate responsibility for the conduct of a fair and lawful trial",[14] and in *McMann v. Richardson*, supra, this Court stated:

> "[J]udges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their court."[15]

Admittedly, defendants who do not raise the issue in the trial courts and, thus, are precluded from raising it on appeal, may resort to collateral attacks on the judgment in state and federal coram nobis and habeas corpus proceedings. However, those proceedings are generally available only after incarceration and, even then, the result is often affected by concerns such as respect for finality of judgments and conservation of judicial resources.[16]

Where, as in the present case, the petitioner's trial counsel participates in appellate proceedings, the need for the reviewing appellate court to note and consider, *sua sponte*, the inadequacy of a defendant's trial counsel - when such inadequacy appears on the record - becomes crucial because a defendant, after the termination of his appeal, may never know the constitutional defectiveness of his legal representation.[17] Accordingly, petitioner submits that under the facts of this case the Alabama Court of Criminal Appeals was constitutionally required to note and consider, *sua sponte*, as plain error the obvious inadequacy of the petitioner's legal representation, and this failure denied petitioner his Sixth Amendment right to effective legal assistance and his Fourteenth Amendment right to due process of law.

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[14] **Lakeside v. Oregon**, Id., 435 U.S. at pp. 341-342, 98 S.Ct. at p. 1096.

[15] **McMann v. Richardson**, supra, 397 U.S. at p. 771, 90 S.Ct. at p. 1449.

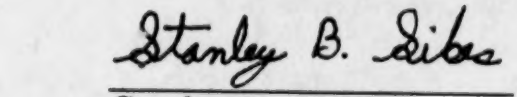
[16] These concerns emerged in **Stone v. Powell**, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

[17] As stated by this Court in **Geders v. United States**, 425 U.S. 80, 88, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976): "Our cases recognize that the role of counsel is important precisely because (the ordinary) defendant is ill equipped to understand and deal with the trial process without a lawyer's guidance." And as was stated by Justice Sutherland in **Powell v. Alabama**, supra, 287 U.S. at p. 69, 53 S.Ct. at p. 64: "Even the intelligent and educated layman has small and sometimes no skill in the science of law * * He requires the guiding hand of counsel at every step in the proceedings

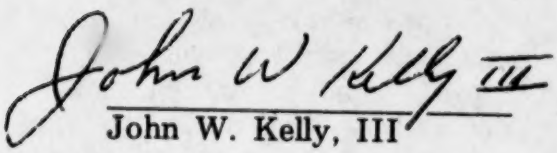
CONCLUSION

For the special and important reasons set out herein, a writ of certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal Appeals.

Respectfully submitted,



Stanley B. Sikes



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Footnote 17 Continued

against him . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.". In this case, petitioner was able to retain counsel at the trial and appellate levels and, indeed, has retained counsel relative to this appeal; however, were it not for the fact that petitioner obtained, read and was reasonably able to understand the opinion of the Alabama Court of Criminal Appeals, he could very well be in prison today - - - without ever learning of the constitutional defects which attended his trial.

CERTIFICATE OF SERVICE

I do hereby certify that I have placed three (3) copies of the above and foregoing petition for writ of certiorari, together with the appendix thereto, in the United States mail first-class postage prepaid, correctly addressed to Honorable Charles A. Graddick, Attorney General, State of Alabama, State Capitol, Montgomery, Al. 36130, (the only party required to be served), on this the 21st day of April, 1981.

Stanley B. Sikes

Stanley B. Sikes